Adopted

Winter Meeting
December 1-4, 1999
Scottsdale, Arizona

RESOLUTION
ADOPTING ENVIRONMENTAL MARKETING GUIDELINES FOR ELECTRICITY

WHEREAS in some areas of the country, the electric power industry stands poised to reshape itself from regulated monopoly to open competition; and

WHEREAS electricity will be marketed in new and different ways as a result of this transition; and

WHEREAS electricity has a major environmental component, and for those consumers who wish to minimize the environmental impact of electric power generation, the marketing of environmental benefits will be a powerful advertising theme; and

WHEREAS Attorneys General have long been interested in encouraging marketing that accurately informs consumers about the environmental impacts of the products they buy and in discouraging environmental advertising that deceives consumers into believing they are making positive environmental choices when in fact they are not; and

WHEREAS just as deregulation of interstate telecommunications led to deceptive marketing of those services as well as consumer benefits, there is a potential for fraud and deception in the marketing of electric power; and

WHEREAS the Environmental Marketing Subcommittee of the National Association of Attorneys General (NAAG) Energy Deregulation Working Group drafted Environmental Marketing Guidelines for Electricity (Guidelines); and

WHEREAS the draft Guidelines were circulated widely to interested persons, including industry groups and environmental groups; and

WHEREAS the Subcommittee held two public hearings at which interested persons were invited to testify; and

WHEREAS the Subcommittee has carefully considered all comments from interested persons and made appropriate revisions to the Guidelines;

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

1. Adopts the Guidelines described above and attached hereto as a statement of the general views of the Attorneys General as to environmental marketing of electricity, subject to the exercise of their individual prosecutorial discretion and variations in individual state or common law; and

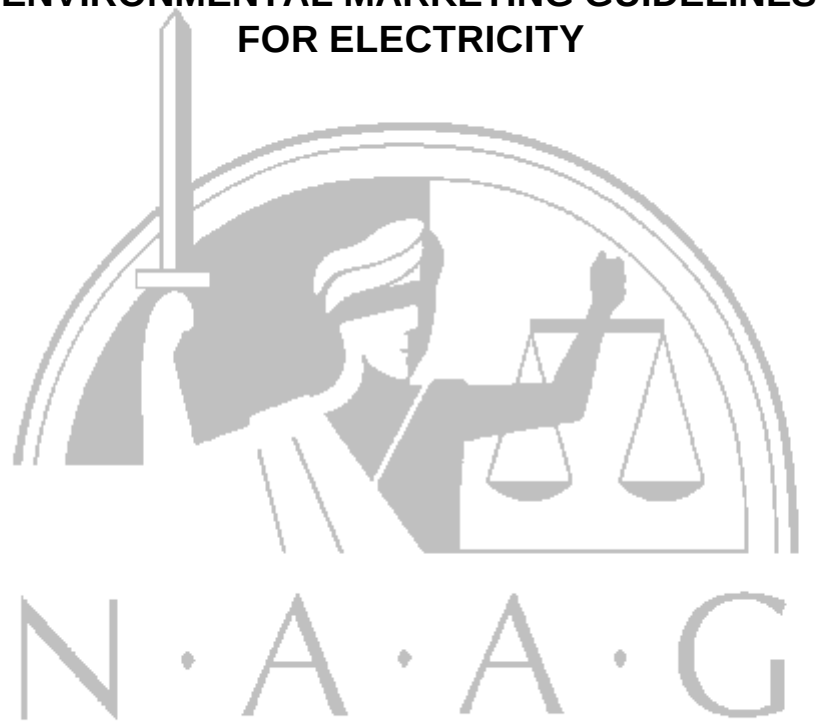
2. Urges the electric power industry to conform its advertising of electricity products and companies to the Guidelines; and

3. Encourages each Attorney General, in the absence of relevant state law, to promote use of the Guidelines as a model for legislation or rulemaking, or both, and as guidance for enforcement action as appropriate; and

4. Authorizes the Executive Director and General Counsel of NAAG to make the Guidelines available to appropriate state and federal officials and to interested individuals and associations.

Abstain: Attorney General John J. Farmer, Jr., Attorney General Heidi Heitkamp, Attorney General Eliot Spitzer

ENVIRONMENTAL MARKETING GUIDELINES FOR ELECTRICITY



National Association of Attorneys General

Environmental Marketing Subcommittee of the Energy Deregulation Working Group

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N·A·A·G

Introduction

As the 20th century draws to a close, the electric power industry in the United States stands poised to reshape itself, from regulated monopoly to open competition. Whether this change will benefit consumers overall remains to be seen, but one thing is certain: it will transform the way power is marketed, and, as a consequence, the way power is perceived by the public. The dark side of this development is the potential for deceptive advertising. Just as deregulation of interstate telecommunications spawned deceptive marketing, competition among deregulated power companies for new customers may give rise to unfair and deceptive practices where none existed before.

There is cause for concern not only because of the enormity and importance of the electric power industry, but also because electricity has a major environmental component. How power is generated can affect the extent to which our air is (or is not) polluted, our groundwater contaminated, hazardous wastes created, scarce resources consumed, and animal and plant habitat endangered. For those consumers who prefer non-fossil fuels or renewable energy, the marketing of environmental benefits will be a powerful advertising theme, one which is open to abuse.

State Attorneys General have an important role to play in ensuring that environmental marketing by electric power companies does not mislead consumers. This role is not an unfamiliar one. In the early 1990s, eleven Attorneys General brought their collective influence to bear on how environmentally "friendly" claims were to be made in the first wave of environmental marketing. At that time, the claims were made to sell tangible consumer products like diapers and plastic bags. In 1990, these Attorneys General issued *The Green Report*, and, a year later, *The Green Report II*, containing recommendations for responsible environmental advertising. Several well-publicized enforcement actions followed, as did the enactment in some jurisdictions of state environmental marketing standards, by statute or rule, and the Federal Trade Commission's promulgation of Guides for the Use of Environmental Marketing Claims, 16 C.F.R. part 260. These actions were taken in response to environmental claims that were already being made, though they operated prospectively to limit future deception. In the case of electric power, on the other hand, there is an opportunity to forge standards of conduct before the newest wave of "green" marketing takes hold.

It is the purpose of these Guidelines to: (1) diminish the potential for deceptive environmental marketing by providing guidance to the electric power industry as it undertakes to craft its advertising and information campaigns; (2) facilitate compliance with the law by providing industry with an interpretation by the Attorneys General of what state prohibitions on deceptive and misleading advertising mean in the context of environmental advertising for electricity; and (3) offer a model for state legislation and/or rulemaking.

At the same time, because some states have enacted their own environmental marketing standards[1] (and others may do so in the future), companies are cautioned to ensure

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[1] See, e.g., Mass. Regs. Code tit. 940, § 19.06; and 52 Pa. Code § 54.6.

that their marketing in or into a particular geographic area is also consistent with such state-specific standards.

At the outset, it should be stressed that electric power is different from most other products in two fundamental ways. First, the electricity that most consumers buy cannot be traced to its exact source. Rather, electricity created by numerous generators is transmitted to a power pool or grid, mixed together, and then drawn upon for customer use. A company that advertises "100% hydropower" cannot mean to say that the electrons provided to a consumer's home are the same as those that were generated by a hydro plant, but only that it has put into the pool as much electricity from that plant as its customers will use, or, in a "tradable tag" system, that a portion of the consumer's payment will go to support hydropower. Thus, the way in which electricity is transmitted from the generator to the end user tends to complicate marketers' ability to tie the attributes of the generation process directly to the purchase of the product. Moreover, because electricity itself is a fungible product, consumers may find it more difficult to verify the truthfulness and accuracy of electricity marketers' claims than they would the claims associated with many other consumer products and services.

Second, the characteristics of electric power sold by a specific company change over time. A generator can break down; transmission lines can become overloaded; weather can affect the availability of wind or solar energy. As a result, it becomes more difficult than with most products to predict the source and related environmental attributes (e.g., emission levels) of the power being offered by any one supplier.

These differences being noted, it is still possible to interpret existing consumer protection law to set forth the standards that follow.[2] It is hoped that these Guidelines will aid industry in ensuring that its environmental advertising serves to inform, rather than to mislead. Conduct which does not do so may result in corrective action by the relevant enforcement agency.

1. Overview

These Guidelines apply to any marketing claim about the attributes of electricity products or companies connected with the generation, distribution or sale of electricity. The claims covered may appear in labeling, advertising, promotional materials, or any other form of marketing, whether asserted directly or by implication, through words, symbols, logos, certifications, depictions, company or product names, or through any other means. Such claims may appear in any medium, including print, broadcast, and electronic media. Claims which are misleading or deceptive could serve as the basis for an enforcement action which

[2] Of course, as pointed out above, in those states that have adopted environmental advertising laws or regulations, marketers must be certain that their claims comply not only with these Guidelines, but also with such individual state laws and regulations, when those are applicable. In the event of a conflict between such state laws or regulations and these Guidelines, the former will prevail.

alleges unfair or deceptive trade practices under state law, notwithstanding a claim's compliance with other laws or regulations.

These Guidelines set forth general principles based on state laws which prohibit the use of misleading or deceptive advertising claims, followed, where appropriate, by commentary that provides further clarification and examples that illustrate the principle. The examples used are not intended to state or imply factual characteristics of the particular fuels or generation methods referred to, but are for the purpose of illustration only. These guidelines are intended to be applied to the facts applicable to a particular advertiser's claim. A particular advertising claim may raise more than one issue under the Guidelines. A supplier may be in compliance with one section of the Guidelines but not another. By the same token, the examples do not reflect the full range of violations, and may not identify all ways of complying with or violating the principles they illustrate. Additionally, literal compliance with a Guideline may still be deceptive when the context of the claim is considered.

2. General Principles

(a) Deception

A claim is deceptive, and therefore unlawful, if it contains an express or implied representation or omission of fact that is likely, or has a tendency, to mislead consumers. An express claim directly makes a representation. The identification of an implied claim requires an examination of the representation in the context of the overall advertisement or other form of marketing, including the juxtaposition of phrases, images, and the nature of the claim and the transaction. The determination of a claim's meaning is made by reviewing the advertisement's overall impression. A claim that can be interpreted in a misleading way may be deceptive, even though other, non-misleading interpretations may be equally possible.

The omission of information may also be deceptive in certain circumstances. Deception can occur through the omission of information that is necessary to prevent an affirmative representation from being misleading. Similarly, it can be deceptive simply to remain silent under circumstances that constitute an implied but false representation. The test for whether an omission is deceptive is whether the overall impression created by the advertisement is deceptive. Throughout these Guidelines, whenever reference is made to an express or implied claim, or to a representation, the reference is intended to include omissions.

Comment. This section states the general principle that a claim is unlawful if it contains a representation or omission of fact that may mislead consumers. The precise elements of deception will vary somewhat, depending upon the state in or into which the representation or omission is directed. Suppliers of electricity should take these differences into account by conforming their marketing claims to the most consumer-protective standards prevailing in their marketing area. A special caveat is also warranted for deception by omission*; if the overall impression created by the claim is deceptive, it does not matter whether the deception is the result of an express representation, an implied representation, or an omission.*

(b) Substantiation

Any party making an express or implied claim that presents an objective assertion about the environmental attributes of an electricity product or company must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. In substantiating technical claims about electricity products or companies, a reasonable basis consists of competent and reliable evidence which supports the claims made. Such evidence may include tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

Substantiation should cover the period that is relevant to the claim. Both prospectively and retrospectively, substantiation evidence may be averaged over a reasonably recent one-year period of time, with allowance made for a de minimis amount of emergency backup power occurring toward the end of the annual averaging period. A claim for which substantiation consistent with these Guidelines does not exist prior to the time the claim is made is considered to be deceptive.

Furthermore, if the same electricity or its attributes are sold more than once to consumers, the claim is deceptive. The Attorneys General take no position on which system of substantiation—auditable contract paths, tradable certificates or some other system—states should adopt.

The types of claims about electricity products or companies that are subject to substantiation requirements include, but are not limited to: (1) identifying fuel types or attributes, generation processes, emissions, or environmental benefits; (2) indicating quantities, whether expressed as a percentage of the whole product, a percentage as compared to competing products, or a measure in relation to an environmental standard, a number of kilowatt-hours, or a rate (e.g., emissions per kilowatt-hour); (3) characterizing the function of generation or transmission systems (e.g., how electricity is transmitted through the power grid); (4) making comparisons (e.g., between competing products, or between past and current performance); (5) linking products or associated attributes to environmental benefits (or harms), including claims of general environmental benefit; (6) indicating endorsements or certifications (e.g., seals of approval); and (7) describing mitigation of environmental impacts.

Substantiation of a claim about the *past* attributes associated with a specific electricity product, or with the electricity offered by a supplier, should consist of competent and reliable evidence sufficient to establish, for the period relevant to the claim, that (a) the supplier generated or purchased electricity with the claimed attributes in amounts sufficient to match actual consumption by consumers who purchased the advertised electricity, (b) the electricity was supplied to the interconnected grid serving those consumers, and (c) the same generated electricity was not sold to more than one consumer.

Substantiation of a claim about *current* or *future* attributes associated with a specific electricity product, or with the electricity offered by a supplier, should consist of (a) competent and reliable evidence to support the expectation that supplies of electricity will be sufficient to meet the reasonably anticipated demand for power with the claimed attributes (e.g., contracts for future supplies of power), and (b) competent and reliable evidence sufficient to establish retrospectively, for the period relevant to the claim, that (i) the supplier generated or purchased electricity with the claimed attributes in amounts sufficient to match actual consumption by consumers who purchased the advertised electricity, (ii) the electricity was supplied to the interconnected grid serving those consumers, and (iii) the same generated electricity was not sold to more than one consumer.

Where a claim is based on the purchase of certificates or "tags" representing the attributes of an electricity product or of the electricity offered by a supplier, but not the power itself, substantiation should consist (a) for a claim about *current or future* attributes, of competent and reliable evidence to support the expectation of certificates sufficient to meet reasonably anticipated demand for the attributes they represent; and (b) for *any* claim, of certificates that reliably establish that for the period relevant to the claim, the supplier purchased the rights to the claimed attributes in an amount adequate to meet consumption demand for the product consistent with the claimed attributes. In addition, no more than one certificate should be issued for any one unit of power. Finally, it is recommended that certificate-based claims be accompanied by a clear and prominent disclosure of the use of a tagging system to substantiate the claim.

Comment. This section addresses how to substantiate claims associated with specific electricity products and with a company's products as a whole. For the FTC's definition of what constitutes "competent and reliable evidence" to substantiate a claim, see FTC Policy Statement Regarding Advertising Substantiation Program, 49 Fed. Reg. 30999 (Aug. 2, 1984). Claims are divided into those that relate to past characteristics and those that relate to current or future characteristics. The former require competent and reliable evidence that electricity with the advertised characteristics was generated or purchased by the supplier, was placed on the grid serving the consumers to whom the offer was directed, and was not sold to more than one customer. The latter require competent and reliable evidence to support (1) the prospective expectation that the characteristics of the electricity being offered will conform to the claim, given reasonably anticipated public demand for it, and (2) the retrospective assertion that electricity with the advertised characteristics was generated or purchased by the supplier, was placed on the grid serving the consumers to whom the offer was directed, and was not sold to more than one customer. This means that if, in the course of an advertising campaign, it appears that consumer demand may outstrip the supply of available power with the advertised attributes, the supplier must either arrange for additional power of the same description or stop soliciting new customers.

The Attorneys General recognize that it is physically impossible to determine the sources of the electrons used by any given consumer. Thus, when a consumer chooses a particular electricity product based on the environmental attributes associated with how and where that power was generated, what s/he is actually doing is financially supporting the chosen generation source, not buying the precise energy generated by that source. The Attorneys General believe that such financial support is consistent with what consumers who prefer a certain type of generation for environmental reasons would seek to do—that is, direct the flow of their payments for electricity toward preferred generation sources. Nonetheless, it is likely that many consumers do not currently

understand this feature of electricity and the market for power, so that consumer education in the area will be very important.

The Guidelines accept an auditable contract path as an acceptable form of competent and reliable evidence. This is because, while one cannot verify the source of any particular electrons, it is possible to follow the financial transactions that underlie the generation of electricity and its purchase by specific consumers. First, the usage by the customer is measured at the customer's meter. The customer is billed for that usage and the proceeds for the energy go to the supplier. The supplier in turn must pay, either directly or through a middleman, the generators whose power it bought in order to meet customer demand. In this way, the customer's usage is linked, through the financial process, to identifiable generation units and characteristics—for example, the fuel type or emissions associated with electricity that came from those units. Thus it is possible to say with reasonable certainty that the customer's purchase and use of power did result in the generation and placement on the grid of power possessing the power characteristics of the supplier's offer and that no other claim is made on that power. This allows suppliers to use the financial trail to substantiate their claims as to the quantity and attributes of their electricity.

The Guidelines also accept averaging of characteristics over a reasonably recent one-year period. This is because inherent in the process of generating and transmitting electricity are fluctuations over time. In order to ensure that the availability of electricity to customers is reliable, suppliers use contingencies such as buying or generating power from other sources to make up for any temporary shortfalls in their regular supply. As a result, the fuels, generation processes and emissions characteristics associated with a customer's electricity are likely to vary slightly from hour to hour and from month to month. Moreover, suppliers may not know in advance what the exact characteristics will be. For example, if they need to purchase contingency power, they may have to buy it from the spot market, the exact characteristics of which they cannot predict. The FTC has adopted a similar approach in permitting calculation of recycled content based on an annual weighted average. See 16 C.F.R. § 260.7(e), Ex. 9. However, literal compliance with a Guideline may still be deceptive when the claim is considered in the context of the entire advertisement. In making claims about the future attributes of an electricity product or company, marketers are urged to be specific about the -period over which they are averaging environmental characteristics.

Using a tradable certificates (or "tagging") system to substantiate electricity product or company claims raises an additional and significant issue of consumer understanding and acceptance. Under a tagging system, the environmentally preferable attributes of specific power generation—the "premium" associated with preferred generation—are available to be sold separately from the power itself. Such a system is similar to substantiation based on a contract path in that both involve the flow of money from the consumer to the advertised generation source and evidence that claims are not made twice for the same units of electricity. However, under a tagging system, a supplier of power that is advertised as "50% hydro, 50% natural gas" may actually buy all of its electricity from a nuclear power plant, but has the right to claim a "hydro-gas" mix because it also purchased unique tags from "hydro-gas" generators. This raises questions about what tagging-based claims mean to consumers and underscores the benefit to consumers of disclosure of the use of a tagging system.

For any claim that is based on a tagging system, the supplier should have certificates that reliably establish that, for the period relevant to the claim, the supplier purchased the sole rights to the claimed attributes in an amount adequate to meet consumption demand for the product consistent with the claimed attributes. In addition, no more than one certificate should be issued for any one unit of power. To help consumers understand what they are buying, it is recommended that

the claim be accompanied by a clear and prominent disclosure of the use of a tagging system to substantiate the claim. Furthermore, any claim about current or future attributes that is based on the purchase of certificates requires competent and reliable evidence to support the expectation that the generators of electricity from whom the certificates are purchased will produce sufficient electricity to meet reasonably anticipated demand for the attributes they represent. Unless state law allows otherwise, marketers are cautioned to avoid making claims based on a tagging system that state or imply that the supplier has actually purchased the power itself—as opposed to its environmental attributes—from the preferred generators.

The Attorneys General do not take a position on which method of substantiation— auditable contract paths, tradable certificates, or some other method—a state should adopt. However, recognizing that some states are already moving in the direction of permitting either auditable contract paths or tagging as means of substantiation, the Attorneys General have adopted a Guideline that seeks to ensure that whichever system is used, (1) reasonable substantiation exists prior to the time an environmental marketing claim is made, (2) substantiation data can be averaged over a fair and reasonably recent period of time, and (3) claims relating to electricity (or its attributes) are not "double-sold." If a tagging system is adopted, the Attorneys General also recommend that disclosure be made so that consumers understand the meaning of tagging-based claims.

Ex. 1. Company A burns coal to generate electricity and claims that new technologies allow the generator to cut its rate of emissions for SO_2 and NO_x to half their previous levels. The generator possesses scientific tests conducted according to accepted scientific procedures that support the claim. The claim is adequately substantiated and is not deceptive.

Ex. 2. Company B runs an advertisement that claims, "Last year, one-quarter of our power came from the sun or the wind." Company B possesses an auditable record of contracts which shows that 25 percent of the electricity it purchased and put on the grid serving the area in question came from solar and wind generators, and that that electricity was not sold to more than one consumer. The claim is adequately substantiated.

Ex. 3. Company C offers an electricity product that it advertises as "less than 10% fossil fuels." Company C arrives at a reasonable estimate of the consumer demand for the product over the next year and enters into contracts with generators sufficient to meet that demand from sources that include no more than ten percent fossil fuels. In addition, at the end of the year, an audit of the amounts of electricity supplied to Company C establishes that the electricity supplied under its contracts which included less than ten percent fossil fuels met actual consumer demand for the product in the area where the claim was aired, was placed on the interconnected grid serving those consumers, and was not sold to more than one consumer. The claim is adequately substantiated.

Ex. 4. A supplier advertises an electricity product in Region A as "50% Hydro, 50% Natural Gas." The basis for the claim is that the supplier has purchased "tags" from hydro and natural gas generators for power sufficient to meet reasonably anticipated demand for the product for the next year. In addition, for the period relevant to the claim, the supplier possesses certificates adequate to meet such demand; and the tagging system exists throughout Region A, with no more than one certificate issued for any one unit of power. Assuming that the fuel-mix claim does not imply any specific geographic location of the generators, the claim is properly substantiated. However, it is also recommended that the claim be accompanied by a clear and prominent disclosure which explains to consumers

that the claim is based on the purchase from specific generators of the right to claim those generators' fuel mix for the power it sells.

(c) Qualifications and Disclosures

In order to be effective, any qualifications or disclosures should be sufficiently clear and prominent to prevent deception. Clarity of language, relative type size and proximity to the claim being qualified, and an absence of contrary claims that could undercut effectiveness, will maximize the likelihood that the qualifications and disclosures are appropriately clear and prominent. If a claim states any specific environmental benefit, it should be accompanied by disclosure of all significant environmental harms associated with the relevant product (in the case of a product claim) or the relevant company (in the case of a company claim) that reduce or eliminate the stated environmental benefit. A claim that is otherwise deceptive cannot be rendered non-deceptive by a qualification that is inconsistent with the substance of the claim.

Comment. The Federal Trade Commission's approach to qualification of environmental product claims is consistent with this section, see 16 C.F.R. § 260.6(a), with two clarifications. First, to avoid overstating a claimed environmental benefit, all environmental harms associated with the advertised product or company that serve to diminish the claimed benefit should be disclosed. Second, if a claim is deceptive, it cannot be saved by a qualification that is inconsistent with the claim. Marketers are cautioned to ensure that qualifications and disclosures serve the function of explaining or detailing, rather than changing the meaning of, the claims they modify.

Ex. 1. An Ohio company sends direct mail to potential customers stating that the company is "working to reduce air pollution in Ohio" and including a bar graph showing a recent "50% decline in NO_x, SO_2 and CO_2 emissions" from the company's local coal plants. The decline is significant and can be substantiated based on the company's installation of advanced scrubber technology. However, the company fails to disclose that it also recently constructed new garbage incineration generators in Ohio which produce enough air emissions to diminish significantly the impact of the coal plant emission reductions. The mailing is deceptive because it implies that the company's net pollution reduction is significantly greater than it really is. Clear and prominent disclosure of the new garbage incineration emissions or a bar graph showing the net decline in the company's total air pollution could prevent the deception.

Ex. 2. A print advertisement describes an electricity product as "No Nukes, No Coal.*" At the bottom of the ad, next to the asterisk, there appears this statement: "When there is a sufficient supply of wind and solar power." The meaning of the disclaimer is that the supplier will purchase nuclear- or coal-generated power when conditions limit the availability of wind or solar energy. If, in order to meet consumer demand for the product as advertised, the supplier will rely on nuclear or coal generation, the qualification is inconsistent with the substance of the claim, and the claim is deceptive.

(d) Properly Linking Attributes and Benefits to the Product

An environmental marketing claim about electricity should be presented in a way that makes clear whether the environmental attribute or benefit refers to the fuel source, the generation process, the emissions, or some other aspect of the product, of a portion or component of the product, or of a company. The claim should also indicate whether it reflects

historical performance or projections of future performance. If, however, the environmental attribute or benefit applies to all but minor, incidental components of the product, the claim need not be qualified to identify that fact.

Comment. Environmental claims can be based on all of a company's sales or activities, or on differing percentages of the electricity it sells divided into different products. Although the "company approach" is responsive to consumers who are interested in a firm's total operations, it can be easily evaded by creating other companies to offer specific products; it may also remove any incentive to developing environmentally preferable products, and would represent a major departure from the "products approach" applicable to other industries. However, claims which state or imply that certain environmental benefits or attributes apply to a company will be evaluated based on the company's record as a whole.

Ex. 1. An advertisement tells consumers they will "make the air clean" if they buy Company A's electricity. The basis for the claim is that the supplier plants trees in Central America to replenish the rain forest, which in turn recycles carbon dioxide through the natural process of photosynthesis. The supplier also plans to purchase and retire credits of sulfur dioxide (which causes acid rain). Notwithstanding the value of the efforts to mitigate air pollution, the fuel source for the supplier's generation includes significant amounts of coal. The advertisement makes an implied claim that the electricity sold by this supplier, taken as a whole, results in no significant detrimental impact on air quality. The fact that the supplier sells power generated from coal means that the claim is misleading, since combustion of coal emits significant air pollutants.

Ex. 2. A company generates electricity from two sources: a hydrodam and a nuclear power plant. Both are located on the same river in the Pacific Northwest. The company brochure declares that its electricity is "fish-friendly" because it has installed fish ladders and special turbines designed to enable salmon populations to spawn and return to the ocean. However, the nuclear reactor emits hot water into the river after it has been used as a coolant in the plant. The heat changes the water temperature, causing significant mortality in fish eggs. Since consumers could reasonably assume that the "fish friendly" claim applies to both sources of the company's electricity, the claim is misleading. Even if this claim were qualified to apply only to the hydrodam energy source, it would still be deceptive if the hydrodam caused any significant harm to fish. The FTC takes a similar approach with respect to "ozone friendly" claims. See 16 C.F.R. § 260.7(h).

Ex. 3. A product claims simply to be generated from "biomass." The materials combusted to generate the electricity are all taken from agricultural residues with the exception of a small amount of natural gas used to ignite the biomass. Because in this case consumers are likely to consider the ignition fuel to be a minor, incidental component associated with the product's generation, the claim is not deceptive.

Ex. 4. Western Hydropower, a company that generates hydroelectric power in a region that allows for tradable tags, sells to another facility tags representing the hydroelectric nature of the power generated. The company then markets the untagged energy under the name Western Hydropower, thus implying that the electricity still has the attributes that were sold with the tag. The company's marketing scheme is deceptive.

(e) Overstatement of Environmental Attributes

An environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication. Marketers should avoid implying a significant environmental benefit if the benefit is in fact negligible. They should also avoid making claims about the absence or low level of a particular attribute if there is no known environmental harm associated with that attribute.

Comment. The Federal Trade Commission takes a similar approach to environmental product claims. See 16 C.F.R. § 260.6(c).

Ex.1. A supplier labels its electricity product as "50% more renewables than before." Of the 250 megawatt-hours generated by the supplier, the total derived from renewables has risen from two to three megawatt-hours. While it is technically true that the supplier generates 50 percent more electricity from renewables than it did previously, the claim is likely to convey the false impression that the increase in renewables is a significant portion of the total power produced.

Ex. 2. "Choose our 100% renewable power option to make a difference in the world and reduce our nation's addiction to fossil fuels," a newspaper advertisement urges. The advertiser is able to substantiate that 100% of its power comes from renewable power facilities. However, none of the facilities are new, and all of them are generating the same amount of power they produced for the former, regulated electricity market; in addition, there is no evidence that once the demand for renewable power exceeds the supply, the amount or percentage of renewable power generation will increase. The claim is deceptive because it overstates the environmental benefit of supporting the pre-existing renewable facilities.

Ex. 3. An advertisement on television states, "Company Z—We protect the planet!" In fact, 97% of Company Z's energy portfolio is comprised of highly polluting, antiquated coal generators and poorly sited hydroelectric dams which have profound negative impacts on the environment. The television ad is deceptive because it overstates Company Z's environmental record.

(f) Comparative Claims

Environmental marketing claims that include a comparative statement should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception. Comparative claims should also not be made unless the difference between what is being compared is environmentally significant.

Comment. The Federal Trade Commission takes a similar approach. See 16 C.F.R. § 260.6(d).

Ex. 1. An electricity product is described as "20% more renewables." The claim is ambiguous. Depending on contextual factors, it could be a comparison either to the advertiser's immediately preceding product or to a competitor's product. The advertiser should clarify the claim to make the basis for the comparison clear, for example, by saying, "20% more renewables than our previous product." With such a clarification, the claim is

not deceptive if there is a significant environmental benefit associated with the comparison. In addition, the advertiser should be prepared to substantiate the comparison.

Ex. 2. A generator claims, "Our electricity has the lowest rates of emissions of any generator in the region." The claim is true as to all types of emissions, although the electricity is considerably less than 100 percent emission-free. Provided that the difference in emission rates between the advertised product and those of its competitors is significant, and that the specific comparison can be substantiated, the claim is not deceptive.

Ex. 3. A generator claims, "Our facilities emit fewer pollutants per kilowatt-hour" than a competing company's facility. Whether or not this claim is true depends on the basis used to determine the comparison. Under state and federal permit standards, emission levels are determined by a plant's potential-to-emit rather than its actual emissions, which may result in misleading "apples v. oranges" comparisons. Whenever such statements are made, the basis for the comparison must be uniform (actual emissions v. actual emissions; permit levels v. permit levels), and the advertiser must be prepared to substantiate the claim.

Ex. 4. An advertisement reads, "Our air emissions are among the lowest." It is true that the company making the claim produces air emissions that are, company-wide, lower than the emission levels of most of its competitors. On the other hand, because a large portion of the competitors' power is generated by a small number of companies, the marketer's emission levels are above the average for the appropriate region. Since consumers are likely to interpret this comparative claim as meaning, among other things, that the marketer's emissions are at least below average, the claim is deceptive.

(g) Geographic Limitations on Claims

Consumers should be informed, by clear and prominent disclosure, if a claim states or implies an environmental attribute or benefit which actually occurs or exists outside the geographic area in which the environmental marketing claim is being made.

Comment. The environmental effects of producing electricity are often, though not always, felt most acutely in the locality or region where the generation or related activity takes place. This section seeks to ensure that marketers do not mislead consumers as to the beneficial impact of an electricity product or company on the environment in their particular geographic area. Some claims (e.g., global warming) may not imply a limited geographic impact. However, special caution should be used in connection with claims that are either communicated over a wide geographic area or directed at environmental attributes that are localized in their beneficial effects. Special caution should also be used when the supplier relies on contract paths that create uncertainty as to where the purchased power will be generated.

Ex. A company advertisement depicting windmills claims the supplier "does not pollute the air." The company owns a wind farm on the West Coast. All of the power from the wind farm, whose generation results in no air emissions, is used to meet the usage of its customers in California. However, the company also offers electricity service in the East, where it purchases power from a variety of sources, none of which includes wind. The ad runs on the East Coast. While it is true that the wind-generated electricity has no air emissions, the claim is deceptive since it implies an environmental benefit to customers on the East Coast where little or no meaningful benefit exists. On the same facts, it would not

be deceptive to run an advertisement stating that the company is "not polluting the air in the West."

(h) Scope of Claims

Claims of general and specific environmental impact should take into account, as relevant to the claim made, the environmental impact of (1) any process by which the fuel source is created or prepared, (2) the process of generating the electricity, (3) the disposal of waste resulting from the generation process, and (4) the siting of the generating facility.

Comment. The range of activities that ultimately underlie the generation and sale of electricity is very broad. Makers of environmental marketing claims need to know which aspects of the "life cycle" of electric power they should take into account in crafting their claims. The Attorneys General are of the view that consumers evaluate such claims primarily with reference to the activities that are closest to the processes by which the power is generated: the creation or preparation of the fuel source, the actual generation of the electricity, the disposal of waste resulting from generation, and the siting of the generating facility. Life-cycle aspects that are further afield (e.g., the materials and processes used to construct/manufacture a generating facility/device, or the aesthetic aspects of siting) should be taken into account only when the claim requires it to avoid deception. In determining which of the four life-cycle aspects to take into account, marketers should consider whether each is relevant to the environmental impact that is the subject of the claim in question.

Ex. 1. An advertisement for the nuclear power industry states, "Nuclear power plants don't burn anything to produce electricity, so they don't pollute the air." However, highly polluting coal plants are often used to produce the enriched uranium fuel that powers nuclear plants. The advertisement is deceptive.

Ex. 2. In an advertisement, a power supplier that uses coal as its fuel source claims that in producing electricity the company uses only "clean coal from the Great West" and couples this statement with images of mountains, forest streams and fly-fishermen. In fact, the process of mining the coal includes open pits, haul roads and stream degradation. The advertisement is deceptive.

3. General Environmental Benefit Claims

(a) Basic Principles

It is deceptive to misrepresent, directly or by implication, that a product or company offers a general environmental benefit. Unqualified claims of general benefit are difficult to interpret, and, depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may suggest that the product or company or their associated processes have specific and far-reaching environmental benefits. Every implied representation that the general assertion conveys to consumers must be substantiated. Unless this substantiation duty can be met, broad environmental claims should either be avoided or properly qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted. When a claim of general environmental benefit

is made, the environmental impacts that will be considered in evaluating that claim include all significant environmental impacts.

Comment. General environmental claims are too vague to be meaningful, are difficult if not impossible to substantiate, and, because of the inherent complexity of environmental issues, tend to be inaccurate. Indeed, such claims may implicitly convey the message that a product or company is good for the environment in all respects—a message that, in the case of most forms of electric power generation, no matter how benign, will be inaccurate and not capable of being substantiated. By contrast, consumers need clear environmental information in order to make meaningful comparisons between electricity products and providers. Those who make such claims risk violating state prohibitions against deception and would be well advised to keep their claims narrowly drawn and focused on specifically identified environmental attributes. See 16 C.F.R. § 260.7(a).

Ex. 1. A California supplier has won several awards for making contributions to the study of environmental issues. In an advertisement for an electricity product that is fully renewable and without significant emissions, the supplier describes itself as an "environmentally friendly" company. However, the company offers a variety of products in California in addition to the one advertised, and at least one of these products is composed of power from fossil fuels and nuclear resources; the fuels used to generate this power emit harmful substances into the environment. The unqualified use of "environmentally friendly" in the advertisement implies that there are no significant threats to the environment from the company, not just from the particular product being advertised. The claim is deceptive.

Ex. 2. An advertising flyer for an energy service provider displays an image of children playing by a sparkling, tree-lined lake and makes the claim, "Because we care about the environment and our common future, we sell only low-impact power from state-of-the-art electricity generation facilities." Without further qualification, the claim and its context create an impression of general environmental benefit, and any meaning this conveys to consumers must be substantiated. On the other hand, if the term "low-impact" is expressly defined in the advertisement in relation to some generally accepted standard of "low-impact," it may not be deceptive.

(b) *"Green"*

It is deceptive to misrepresent, directly or by implication, that any product or company is "green." "Green" is a term of general environmental benefit, and as such, every implied representation of significant environmental benefit or lack of significant environmental harm that the general assertion conveys to consumers must be substantiated. Accordingly, use of "green" should be accompanied by clear and prominent disclosure of the sense in which the term is being used; and even where qualified, "green" may have some other, contextual meaning to consumers that must be substantiated. Claims using the term "greener" should be presented in conformity with this subsection and with the Guideline on comparative claims.

Comment. The Attorneys General believe that at this time, the term "green" has no generally accepted meaning and thus cannot be defined with any precision. Depending upon the specifics and context of the claim and the nature of the audience, "green" may convey a message

of no significant impact, of general environmental superiority, or of some specific positive environmental attribute. Given this potential for consumer confusion, the most reasonable course is to consider "green" to be a term of general environmental benefit and hold marketers responsible for substantiating any meaning that a "green" claim in context conveys to consumers. Even limiting language may not be enough to save a "green" claim from being deceptive when the overall import of the advertisement implies more than the stated limitation would suggest. Marketers are cautioned to use the term "green" only in ways that leave no doubt as to the claim's intended meaning.

Ex. 1. Company A mails consumers a solicitation which refers to its electricity product as "green." The marketer's unwritten basis for this claim is that a portion of the fuel mix comes from certain renewable resources that have no harmful emissions or other significant impacts on the environment. However, the remainder of the product comprises system power, much of which is derived from fossil fuels and nuclear resources and produces significant air emissions and radioactive waste. If consumers interpret the term "green" to mean that no significant harmful impact will result to the environment, the claim is deceptive. The claim is not deceptive if it is accompanied by clear and prominent language limiting the "green" representation to the emissions-free renewable resources, provided that no other deceptive implications are created by the context.

Ex. 2. Company B offers "green power" made from solar panels located in the nearby desert. The fuel source is renewable within the meaning of the Guidelines. The generation and transmission processes release no harmful substance into the environment, and, together with the placement of the panels and transmission lines, pose no significant harm to the environment. The claim is not deceptive.

Ex. 3. Company D runs an advertisement that claims that consumers will "be green" by buying a product derived entirely from wind. The wind is renewable, and the turbines release no air emissions into the environment. However, the particular location of the turbines used to generate this "green" power has been shown to threaten an endangered species of raptor. Absent a clear and prominent disclosure of this detrimental environmental impact, the use of "green" in the advertisement is deceptive.

4. Specific Environmental Claims

(a) "Clean"

A "clean" energy source is defined as any energy source that does not cause significant emissions. It is deceptive to misrepresent, directly or by implication, that any product or company is "clean." Claims using the term "cleaner" should be presented in conformity with this subsection and with the Guideline on comparative claims.

Comment. The term "clean" has a common vernacular meaning of "not dirty." As an environmental marketing claim, it can be expected to connote to most consumers an absence of significant emissions. It is deceptive to represent, directly or by implication, that electricity is derived from clean sources when it is not.

Ex. 1. An energy product generated by Company X is advertised as "Hydropower—The Clean Energy Source." If the electricity being sold is in fact derived from hydropower, and

the supplier can substantiate that the generation of that electricity results in no significant emissions, the claim is not deceptive.

Ex. 2. A supplier urges consumers to "Help us make the environment clean." The product offered for sale comes from a portfolio comprising half renewable energy resources with no emissions, and half from the spot market; the latter comes in part from fossil-fuel burning plants and nuclear reactors and thus has significant air pollution and radioactive waste associated with its generation. Since continued purchase of this product would result in releasing harmful substances into the environment, the claim is deceptive.

Ex 3. A generator claims that its plants use "clean coal" to make electricity. Consumers may infer, erroneously, that the use of this type of coal will eliminate significant air emissions commonly associated with coal. The claim is deceptive.

Ex. 4. A generator advertises that "we sell clean power, thanks to new scrubber technology." However, the generator's facilities produce significant amounts of scrubber residues, which constitute solid and hazardous waste. The generator's claim is deceptive.

Ex. 5. An advertisement states, "Choose Natural Gas—Cleaner Than Other Fossil Fuels." Company B can substantiate that its product produces significantly less air emissions than other fossil fuels. The claim is not deceptive.

(b) "Renewable"

A "renewable" energy source is defined as any energy source that is replenishable and replenished on some reasonable time scale. Renewable energy sources include, but are not limited to, wind, sun, heat from the earth's interior, oceans and rivers, and eligible biomass. It is deceptive to represent, directly or by implication, that electricity is derived from renewable sources when it is not. It is also deceptive to claim, directly or by implication, that a renewable energy source has no significant negative environmental impacts by sole virtue of the fact that it is renewable. Notwithstanding the above, if a particular state's law provides for a different definition of "renewable," that definition would prevail in that state.

Comment. In defining "renewable" for the purpose of these Guidelines, the Attorneys General have opted for the common meaning of the word, focusing on replenishability on a reasonably short time scale, and applying it to energy sources, rather than technologies. Under this definition, there is no basis for distinguishing between large-scale and small-scale hydro. However, renewable resources can still have a significant environmental impact, so "renewable" is not equatable with "green," "clean" or similar terms, and care must be taken to avoid overstating the environmental import of renewability. The term "eligible biomass," as used in this Guideline, refers to plant matter and animal waste which are replenishable and replenished on some reasonable time scale. Municipal solid waste does not satisfy the definition of "eligible biomass" because it has a significant component of non-renewable organic and inorganic material. Nonetheless, municipal solid waste may be marketed as "renewable" in a particular state if it is so considered under the law of that state.

Ex. 1. A company advertises an electricity product as "Good for the Earth, Because It's 100% Renewable!" The product is based on two renewable energy sources: a large hydrodam and wind turbines. The hydrodam's design prevents significant numbers of a

threatened salmon population from spawning and returning to the ocean, and the location of the wind turbines causes the death of endangered birds. The claim is deceptive because the company improperly asserted that its energy product had no significant environmental impacts by sole virtue of the fact that it is renewable.

Ex. 2. A wind power generator markets its power to consumers as "renewable wind power," but fails to disclose that ten percent of the time the generator is forced to rely on a back-up natural gas generator to deliver a supply of power adequate to meet the consumer demand for the advertised electricity product. Ten percent is not a de minimis variation from the unqualified "renewable" claim made by the generator, and the failure to disclose the use of natural gas is deceptive because natural gas is not a renewable energy source. (This example is not meant to create a "safe harbor" or threshold of ten percent.)

Ex. 3. A supplier advertises a "100% renewable" electricity product composed of wind power, geothermal power and biomass. The biomass portion is the wood waste by-product of a timber operation which clear-cuts large areas of forest and neglects to effectively replant the land. This kind of biomass is "replenishable" but not "replenished," and therefore fails to meet the definition of "renewable" in this Guideline. A "100% renewable" claim may not be made using this supplier's mix of energy sources. However, if the timber operator used techniques in deriving the wood waste such that the biomass is replenishable and replenished on a reasonable time scale, the claim would not be deceptive.

(c) "New" Claims

Generating facilities and improvements to existing facilities should not be described as "new" unless they have been constructed or put into service within the relatively recent past or unless they will be constructed or put into service in the relatively near future, and the "newness" has a significant environmental benefit.

Comment. One of the attributes of power generation that is likely to be material to consumers is its "newness." The fact that a generating plant has been built or come on line recently can create the impression that the environment will benefit, appealing to consumers who want to see a change *in current emissions levels. Thus, in making a claim of "newness," the marketer must be certain that the implied environmental benefit actually exists. This section does not define exactly how long a facility or facility improvement may be described as "new"; that will depend on consumer perceptions in any given case.*

Ex. An advertisement urges consumers to "support new wind generation" by buying a certain electricity product. The product includes electricity generated by a facility comprising a number of wind turbines which came on line within the past year. The use of the term "new" is not deceptive.

(d) Fuel Source Claims

It is deceptive to misrepresent, directly or by implication, the attributes of the fuel source from which an electricity product is derived, or its associated impacts on the environment. Claims about fuel source should be qualified to the extent necessary to avoid consumer deception about the types of fuel used in the process of generating electricity and the benefits to the environment associated with the use of certain fuels.

Ex. 1. A marketer claims its product is derived from hydropower and therefore produces "no harmful air emissions." In fact, the water that makes the hydropower is first pumped uphill into a storage tank using electricity generated by coal and nuclear fuels. Later, the water is released downhill and runs through turbines to make electricity. The claim is deceptive. Claims should not be presented in a way that tends to obscure the true nature of the fuel, the relative amounts of fuels used to generate electricity, or the location where the fuel or the electricity originated.

Ex. 2. In a region where consumers use a total of 100 megawatt-hours of electricity, a supplier offers an electricity product characterized as a mix of 50 percent electricity from renewable resources and 50 percent power from system power, as shown by a pie chart in the supplier's literature. The supplier possesses records which show that it owns enough renewable energy resources to generate 20 megawatt-hours. At the time it makes the claim, the supplier also possesses contracts with other renewable generators for 30 megawatt-hours. Between the "own generation" and the contracts, the supplier has an entitlement to 50 megawatt-hours of electricity from renewable resources, which is enough to satisfy reasonably anticipated consumer demand, and can actually provide that amount of power available to its customers. The claim is substantiated.

Ex. 3. A supplier advertises that electricity generated from biomass helps to solve the problems associated with overfull landfills in a particular state. The supplier does not own any landfills, has no entitlement to landfill fuels, and does not operate in a region where there are landfills in which matter is recovered for incineration. Instead, the company's access to biomass fuels comes from agricultural waste from local farming operations, which would otherwise not be disposed of in a landfill. The claim is deceptive, because the biomass generation relied upon does not help to solve the problems associated with overfull landfills.

(e) Claims Regarding Generation Process, Transmission and Distribution

It is deceptive to misrepresent, directly or by implication, the attributes of the generation process by which electricity is made and the way it is transmitted and distributed. Claims should be qualified to the extent necessary to avoid consumer deception about such matters as: the methods by which electricity is generated, transmitted and distributed; special types of technology and other processes used in generation, transmission and distribution; the location of the generation and the path of transmission from the generator to the customer; the nature of the power "pool" and "grid"; and the benefits or reduction in harm to the environment associated with the use of certain methods of generation, transmission or distribution.

Ex. 1. A company advertises the efficiencies of its combined-cycle natural gas burning power plants, claiming, "This process enables us to get more megawatts, with lower air emissions, from a cubic foot of gas than our competitors get from their old conventional generators." The company possesses competent and reliable scientific data on the efficiency and emissions of its generation process and that of its competitors to substantiate the comparison. The claim is not deceptive.

Ex. 2. A wholesale company generates electricity made by burning coal. The company claims that its plants use selective catalytic reduction and a dry scrubbing system to control and reduce emissions that lead to smog and acid rain. The company is in the process of installing these new technologies and has completed the process in only a small fraction of its generation capacity. Since consumers are likely to infer that the technologies are already

in place in all of the plants, the fact that they are not fully operational at the time of the claim makes the claim deceptive. Also, since the company claims that these new technologies control and reduce environmentally harmful emissions, it must possess, at the time of making the claim, competent and reliable evidence to demonstrate that there is a causal relationship between the use of the technology and the stated environmental benefit.

Ex. 3. A supplier places an ad throughout State A that claims, "Buy your power from us. We produce more hydropower than any other provider in State A." The company does in fact produce the most hydropower in the state, but it has sold all of the generation from its generating facilities at a premium price to a wholesale broker in State B for the next 12 months. The company will meet the load of consumers in State A by purchasing electricity at a discount from other generators. Since the claim could be read by consumers to mean that the power from these facilities would be put into the grid for the purpose of serving customers in State A, it is deceptive.

Ex. 4. An advertisement describes an electricity product comprising hydropower as "from the river to your door," implying that the power used by consumers of the product comes directly from the hydro generating source. The claim is deceptive, because it is impossible to track electricity directly from the generator to the user.

(f) Emissions Claims

It is deceptive to misrepresent, directly or by implication, the amounts or attributes of emissions that result from the generation of electricity. Emissions are defined as all discharges of matter or energy that have a significant negative impact on the environment. Claims about emissions should be quantified or qualified to the extent necessary to avoid consumer deception about such matters as: the types of emissions associated with specific generation; the amounts of emissions relative to environmental standards; the benefits or reduction in harm to the environment associated with the absence or reduction of various types of emissions; and the relevance of the emissions claims to the geographic area in which the claims are made. Care should also be taken to ensure that consumer deception does not occur by the failure to disclose other emissions that have a significant negative impact on the environment. If a reference is made to a specific emission or emissions that have a certain negative impact on the environment, the reference should be accompanied by a clear and prominent explanation of all emissions associated with the product or company that is the subject of the claim that reduce or eliminate that environmental impact.

Comment. In addition to applying the basic principles of deception to claims relating to emissions, this section addresses the appropriate limits of disclosure when the low level or absence of one or more specific emissions, but not others, is referred to in a claim. In such a case, a determination must be made as to what negative environmental impact, if any, is claimed to be reduced or eliminated by the low level or absence of the stated emission(s). Specifically, if an express or implied claim is made regarding the favorable environmental impact of an emission or emissions, the claim should be accompanied by a clear and prominent disclosure of all other emissions that cause the same type of environmental impact.

Ex. 1. An advertisement in a magazine describes an electricity product as "Climate Friendly." The claim is deceptive if the product's energy sources emit any greenhouse

gases in any of the four processes closest to power generation set forth in Section 2(h) (Scope of Claims).

Ex. 2. A gas generation company accurately claims that its electricity product produces "75% fewer acid rain producing pollutants" than a coal-burning plant. The claim is not deceptive, notwithstanding the lack of disclosure of the gas plant's emissions of carbon dioxide (which do not produce acid rain).

Ex. 3. A nuclear energy trade association claims that "nuclear power has substantially lower greenhouse gas emissions than coal-fired electric generation." Assuming the claim can be substantiated, it is not deceptive.

Ex. 4. Company B claims that its fossil-fuel based product is "good for the environment" because, the advertisement states, its use of new scrubbers will mean that "20% less SO_2" is released into the air. No other qualifications are made. The claims are likely to be deceptive. First, the marketer has failed to state the basis of the comparison, so that one can answer the question, "20 percent less than what?" Second, the "good for the environment" statement is a claim of general environmental benefit. Consumers might infer that there is little or no detrimental environmental impact associated with the generation of this electricity; but in fact a product derived exclusively from fossil fuels, even with a 20 percent reduction in SO_2, will still emit significant amounts of air pollutants.

Ex. 5. A generating company claims that its "low sulfur" coal results in "lower levels of SO_2 emissions than other types of coal." In a particular state, consumers infer from this claim that the lower levels of SO_2 will impact favorably on air quality. However, in the case of some low-sulfur coal supplies, any benefit to air quality by these "lower" emissions may be reduced by increases in NO_x and CO_2 resulting from a lower heat rate and the consequent need to burn more coal to achieve the same energy output. If that were the case, the claim would be deceptive.

Ex. 6. Company D advertises an electricity product as "no SO_2," referring to the absence of sulfur dioxide, an air pollutant which is commonly known to contribute to acid rain. However, the generating facility from which the advertised power is purchased emits significant amounts of nitrogen oxides, which also contribute to acid rain. The claim is deceptive.

Ex. 7. A marketer claims that its electricity generated by nuclear power is free of any water pollution. In fact, such generation results in the discharge of hot water, causing significant harm to the aquatic environment. The claim is deceptive.

Ex. 8. An unqualified claim is made that electricity generated by a new hydro facility is "emissions-free." In fact, the consequent flooding of organic matter leads to the early release of significant amounts of greenhouse gases. The claim is deceptive.

(g) Environmental Certifications

It is deceptive to misrepresent, directly or indirectly, that the use of a "seal of approval" or third-party certification in connection with an electricity product or company indicates the superior environmental quality of the product or company. Such certifications should not be advertised unless they mean that the product or company is in fact environmentally superior

in some substantial respect. In addition, to avoid consumer deception, such certifications should be accompanied by the name of the certifying organization, a brief statement of the criteria used to award them, and information sufficient to allow consumers to make further inquiry into the identities of financial sponsors of the certifying organization and any fees charged for certification. If a certification appears without adequate qualifying language, use of the certification should be treated as a general environmental benefit claim for the product or company with which it is associated. Finally, the certifier must have the expertise that it is representing that it has; any certification must be supported by an actual exercise of its expertise in evaluating product features or characteristics with respect to which it is expert; the certification must reflect the position of the certifying organization as a whole; and the certifier must be independent of the company or product to which its certification attaches.

Comment. "Green" certifications for electric power already exist and can be expected to flourish as consumer demand increases for short-hand ways of choosing among competing electricity products. Several possibilities are of concern: that some certifications will be based on attributes of little significance to the environment or will ignore other, more significant negative attributes; that consumers will be confused about the criteria used to award certifications; and that financial considerations may affect the certification process. To address these issues, the Guidelines consider environmental certifications to connote environmental superiority in some substantial respect. It is also recommended that certifications be accompanied by the name of the certifying organization, a summary of the criteria used to award them, and information—preferably a toll-free telephone number—to allow consumers to make further inquiry into the identities of financial sponsors of the certifying organization and any fees charged for certification; otherwise, a certification becomes a general environmental benefit claim, all of whose implied meanings must be substantiated. If in the future it becomes clear that such fees are high enough to pose a significant barrier to companies' obtaining certifications which they would otherwise merit, further disclosure of the fee arrangements may be necessary. Moreover, in some jurisdictions, certification grantors may have an independent duty to prevent the deceptive use of their certifications. Three of the four final requirements—relating to the certifier's expertise, exercise of that expertise, and certification by the organization as a whole—are adapted from the Federal Trade Commission's Guides on Endorsements and Testimonials in Advertising, 16 C.F.R. part 251. The last of the requirements—the certifier's independence from the company or product it certifies—represents a logical inference from the use of such an endorsement.

Ex. 1. A New England supplier distributes promotional literature for its product. The literature displays an environmental seal in the form of a logo that is conferred upon electricity products meeting certain environmental criteria. The seal is accompanied by the words, "Approved by Greenseal, Inc. … At Least 50% Renewable … Contact 1-800-xxx-xxxx for details." The sole criterion for awarding the Greenseal certification is that half of the product's fuel mix is renewable. If the supplier can adequately substantiate the 50 percent renewability of its product, the claim is not deceptive.

Ex. 2. An electricity marketer advertises an energy product which contains 75 percent hydropower, 10 percent wind and 15 percent geothermal. Next to the product description is a smiling earth symbol and the words "Green-Earth Certified by the Eco-Project NW." Absent a more detailed explanation of what "Green-Earth Certified" means and disclosure of how consumers can obtain more information about the certification, the appearance of the symbol is a general environmental benefit claim, and all meanings that consumers would take from the claim must be substantiated.

(h) Mandatory Labeling

Governmentally mandated "labels" for electricity products should, to the maximum extent possible, be in conformance with these Guidelines.

Comment. A number of efforts have been undertaken to design mandatory disclosures or "labels" stating the environmental characteristics (particularly, the fuel source and some emissions characteristics) of electricity products. These labels can contribute substantially to consumer understanding of the environmental attributes of the products on the market and inform consumer choice among those products. It is beyond the scope of these Guidelines to attempt to prescribe the form or content of such disclosures. However, it is strongly recommended that mandatory labels be consistent with these Guidelines and not have the unintended effect of misleading consumers. This goal can be furthered by including in any label a clear and prominent explanation of what information is being presented (for example, absolute and comparative levels of three specific air emissions) and what information is being omitted (all other emissions into air, land and water).

(i) Other Quantitative Claims

(1) "No x" or "x-free." Where "x" is either a pollutant or a source of electric power, it is deceptive for a company to represent that it or its product uses, or causes the emission of, "no x" or that it is "x-free" unless it can substantiate that it or its product uses, or causes the emission of, absolutely no "x." A company may qualify its claim of "no x" or "x-free" by clearly and prominently disclosing that it may occasionally use emergency back-up power which may consist of, or may cause the emission of, some "x," provided that the amount of emergency backup power is de minimis and no more than is necessary to compensate for the emergency shortfall.

(2) "Low x." Where "x" is a pollutant or a source of electric power, it is deceptive for a company to represent that it or its product causes the emissions of a "low" amount of "x" unless (i) the company clearly and prominently discloses the standard against which "x" is measured; (ii) the level of "x" is substantially lower than the standard; and (iii) the low amount of "x" has a significant environmental benefit.

(3) "100% x" or "All x." Where "x" is a source of electric power, it is deceptive for a company to represent that it or its product uses "100% x" or "all x" unless it can substantiate that it or its product uses absolutely nothing but "x" as the source of its power. A company may qualify its claim of "100% x" or "all x" by clearly and prominently disclosing that it may occasionally use emergency back-up power which consists of some source other than "x," provided that the amount of emergency backup power is de minimis and no more than is necessary to compensate for the emergency shortfall.

(4) Specific percentage claims. Where "x" is a source of electric power, a claim that x represents "p%" (i.e., a specific percentage) of a company or product's power mix should be viewed in light of its general context and purpose. If the claim as a whole promotes the benefit of having a small or reduced amount of "x," then the claimant must be able to substantiate that "p%" is the maximum percentage of "x" in the company's or product's power

mix. If the claim as a whole promotes the benefit of having a large or increased amount of "x," then the claimant must be able to substantiate that "p%" is the minimum percentage of "x" in the company's or product's power mix. Without proper substantiation, these claims are deceptive.

Comment. Absolute claims like "no x," "x-free," "100% x" and "all x" should mean absolutely no or all x, subject to a de minimis tolerance in the event that emergency backup power is necessary due to unanticipated circumstances beyond the generator's control. Such emergency backup power should be drawn from system power and be no more than is necessary to make up for the emergency shortfall. With respect to claims of "low x," it is not feasible to draw a bright-line threshold because that term has a range of meanings for different people. Therefore, any claim of "low x" must be accompanied by a disclosure of the basis for the "low" comparison. In addition, the level of "x" must be substantially lower than the stated benchmark; and the low amount of "x" must have a significant environmental benefit. Apart from situations involving emergency back-up power, the Guideline does not permit tolerances from quantitative claims that favor the marketer, as subparagraph (4) makes clear. If there is some doubt about the ability to substantiate a particular quantitative claim, the marketer has the choice of not making the claim in the first place.

Ex. 1. A supplier advertises its electricity product as "no SO_x." The supplier qualifies the claim by clearly and prominently disclosing that in an emergency, it may be forced to rely on a de minimis amount of back-up power that may emit SO_x. During the course of its annual averaging period, the product uses no more than a de minimis amount of emergency back-up power that may cause the release of SO_x. The claim is not deceptive.

Ex. 2. A supplier advertises its electricity product as "no fossil fuels." The supplier also qualifies the claim by clearly and prominently disclosing that it occasionally may be compelled to rely on emergency backup power which may include fossil fuels. During the course of the relevant annual averaging period, the supplier uses no more than a de minimis amount of emergency back-up power which may include power generated from fossil fuels. The claim is not deceptive.

Ex. 3. A supplier advertises its electricity product as "low $S0_2$ compared to all other coal power plants in [the relevant region]." The company clearly and prominently discloses, and can substantiate, that the amount per kilowatt-hour of its SO_2 emissions is substantially less than the amount of SO_2 emissions per kilowatt-hour of the other coal generators in the relevant region. As long as this claim is environmentally significant, it is not deceptive.

Ex. 4. A supplier advertises that its electricity product consists of 15 percent wind power. During the course of the year, the actual percentage of wind power in the product's power mix is 14.1 percent instead of 15 percent. From the context of the advertisement, it is clear that the supplier is promoting the environmental benefit of a high level of wind power. Because the actual percentage of wind power in the advertised product's mix is less than the stated 15 percent, the claim is deceptive.

(j) Claims of Indirect Environmental Attributes

It is deceptive to misrepresent, directly or by implication, the nature of any attributes or environmental benefits that are indirectly associated with an electricity product or company. Claims should be qualified to the extent necessary to avoid consumer deception about

indirect environmental benefits, including mitigation or abatement; financial or other support for businesses, organizations, causes, education, or research which benefits the environment; and benefits associated with any other programs or activities. If a claim states or implies a specific benefit, proper qualification requires clear and prominent disclosure of the magnitude of that benefit relative to any negative environmental impact caused by the product or company being advertised that reduces or eliminates that specific benefit.

Comment. Where indirect environmental benefit claims state or imply a specific benefit, the marketer must clearly and prominently disclose any environmental impacts by the product or company that is the subject of the claim which reduce or eliminate the particular benefit at issue. This is consistent with the Guidelines governing qualifications and disclosures and emissions claims.

Ex. 1. Company A advertises the fact that it plants a tree for every 5,000 kilowatt-hours used by all of its residential customers. The company's advertisement claims this helps to minimize the impact of greenhouse gases that are emitted as a result of generating electricity from its power plants. To substantiate its claim, the company possesses numerous articles from scientific journals which prove that trees absorb greenhouse gases from the air. The company estimates that its average customer will consume 5,000 kilowatt-hours in one year and reasonably anticipates a customer base for the advertised product of 10,000. However, 10,000 trees will have no discernible effect on greenhouse gases; moreover, the electricity generated by the company results in emissions that more than offset any beneficial effect of the trees on greenhouse gases. The claim is deceptive. On the other hand, the claim would not be deceptive if it were limited to the accurate statement that Company A plants a tree for every 5,000 kilowatt-hours used by its residential customers, provided that the context of the claim created no other inferences that could not be substantiated.

Ex. 2. A marketer makes a claim that it is committed to reducing air pollution in State Z. It claims to have given a half million dollars to the Z State University to conduct research on new fuel and engine technologies to replace diesel burning engines. The donation is documented and is substantiated. However, 80 percent of the marketer's contracts for electricity are with antiquated oil burning plants that emit significant pollution into Z's environment. Unless the impact of the oil burning plants on air pollution in State Z is clearly and prominently disclosed, the claim is deceptive. The claim would not be deceptive if it were limited to an accurate statement of the marketer's donation to the university, provided that the context of the claim created no other inferences that could not be substantiated.

Ex. 3. A company runs an advertisement stating only that it contributed $100,000 to a specific environmental organization last year. Assuming the contribution can be substantiated, the claim is not deceptive.

5. Definitions

(a) "Auditable contract path" refers to a system of tracking environmental attributes of electricity generation in which the contracts of a retail provider of electricity to purchase electricity from power marketers or generation companies can be audited.

(b) “Clear and prominent” means that the representation in question is both (i) readily understandable, in the sense that it is expressed in such common words, phrases or expressions, or in such symbolic or graphic form, as to be understood without difficulty by its audience, and (ii) of such size, contrast, color and placement as to be readily noticed and read by its audience.

(c) ”Company,” “marketer” and “supplier” all refer to companies that market or sell electricity to retail end-users.

(d) “Competent and reliable evidence,” for technical marketing claims, means tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

(e) “Consumer” means a retail end-user of electricity, whether a business or an individual.

(f) “CO_2” (carbon dioxide) is a colorless, odorless gas that blocks heat radiating from the earth’s surface from escaping the atmosphere. CO_2 contributes to global climate change or warming due to the “greenhouse effect.” Electric generation facilities are a major source of CO_2 emissions.

(g) “Electricity product” means the electrical energy produced by a generating facility (or an on-site generator), or the attributes associated with that electrical energy, that a retail seller offers to sell or sells to consumers or businesses under terms and conditions specific to an offer or a tariff.

(h) “Emergency backup power” means undifferentiated system power which is needed to make up for shortfalls in electricity generation in situations which are unanticipated and beyond the control of the generator.

(i) “Emit” means to cause a significant release or discharge of matter or energy.

(j) “Environmental impact” means any impact on the physical environment (including human structures) or on living things.

(k) “NO_x” (nitrogen oxides) are compounds of nitrogen and oxygen that once in the air, may undergo a chemical transformation into nitrates and nitric acid. NO_x contributes to acid rain, ground-level ozone (photo-chemical smog), and excessive nutrients in lakes and coastal waters. Electric generation facilities that burn fossil fuel are a major source of NO_x emissions.

(l) “Significant” means not de minimis.

(m) "SO_2" (sulfur dioxide) is a heavy, colorless gas that once in the air may undergo a chemical transformation into sulfates and sulfuric acid, contributing to acid rain. Coal-burning generators facilities are the largest source of SO_2 emissions. SO_2 is one type of sulfur oxide (SO_x).

(n) "Tradable certificates" or "tagging" refers to a system of tracking environmental attributes of electricity generation in which the electricity, and the environmental attributes of the generating sources of the electricity, are distinct commodities and are sold or traded separately. Under such a system, a retail provider of electricity can buy electricity in one place and environmental attributes in another. The "tag" is the right to claim the attributes of the electricity.